STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARREN RUFUS BROWN,

Defendant-Appellant.

UNPUBLISHED
June 17, 1997

No. 188811
Recorder's Court
LC No. 94-012673-FY

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree criminal sexual conduct, penetration occurring during the commission of another felony, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), one count of armed robbery, MCL 750.529; MSA 28.797, one count of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and one count of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced to thirty to sixty years' imprisonment for each first-degree criminal sexual conduct conviction, thirty to sixty years' imprisonment for the armed robbery conviction, fifteen to twenty years' imprisonment for the first-degree home invasion conviction, and five to ten years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, all sentences to be served concurrently. We affirm as to all convictions and sentences except defendant's first-degree home invasion sentence, which we vacate on appeal and remand to the trial court for resentencing.

I

Defendant presents four issues on appeal. First, defendant argues that he received ineffective assistance of counsel at trial because his trial counsel did not extensively cross-examine defendant's grandmother regarding conversations counsel had with the grandmother before trial that conflicted with her trial testimony. We disagree and conclude that defendant's counsel's refusal to extensively cross-examine the grandmother about his conversations with her was trial strategy to protect defendant from prejudicial conduct. See *People v Pickens,* 446 Mich 298, 344; 521 NW2d 797 (1994); *People v Kvam,* 160 Mich App 189, 200; 408 NW2d 71 (1987). Defendant's counsel's only basis for

asserting that the grandmother had made prior inconsistent statements was his recollection of the conversations. It is well established that a lawyer trying a case for a party may not testify at trial. *People v Bahoda,* 448 Mich 261, 307; 531 NW2d 659 (1995) (Levin, J., dissenting). Defendant's counsel may also not have wanted to distract the jury from its focus on defendant's activities by introducing extraneous considerations, such as the grandmother's motivation for talking to both defendant's counsel and the prosecutor and giving them inconsistent statements. See *People v Fisher,* 449 Mich 441, 451-452; 537 NW2d 577 (1995).

Further, we conclude that defendant was not prejudiced by the lack of impeaching cross-examination because the evidence adduced at trial was sufficient to sustain defendant's conviction even in the absence of the grandmother's testimony. The complainant told her sister and her nephew on the night of the attack that defendant had raped her, and she identified defendant both at trial and at a pretrial lineup as the man who broke into her home and who beat, raped and robbed her. Defendant was seen carrying a load of electronic equipment away from complainant's house shortly after the attack, and complainant's neighbor testified that defendant brought the electronic equipment to her house. We conclude that defendant's attorney did not perform in so deficient a manner as to prejudice defendant's right to a fair trial. See *People v Daniel,* 207 Mich App 47, 58; 523 NW2d 830 (1994).

II

Second, defendant argues that the prosecutor deprived him of a fair and impartial trial by making several improper remarks during closing argument. We disagree.

Defendant first asserts that the prosecutor prejudiced the jury against him by vouching for the credibility of complainant and another witness. We disagree. The prosecutor's remarks about complainant assessed the honesty of her testimony and were fair, *People v McElhaney,* 215 Mich App 269, 284; 545 NW2d 18 (1996), particularly because the jury had the opportunity to view complainant's demeanor as she testified. Likewise, the prosecutor's remarks about the other witness were supported by the complainant's testimony at trial, not by the prosecutor's special knowledge of the witness's truthfulness. *Bahoda, supra* at 276. The witness, who lived on complainant's street and sold drugs from her home, admitted before the jury that she had been given prosecutorial immunity to testify and admitted that she was in prison for selling drugs. The witness also told the jury that she had lived in complainant's neighborhood all her life, had known defendant for a number of years, and that defendant had been to her house. The prosecutor's remarks about complainant and the other witness thus did not deprive defendant of a fair and impartial trial. *McElhaney, supra* at 283.

Nor did the prosecutor's statement to the jury that their failure to convict defendant would be a "travesty of justice" deprive defendant of a fair and impartial trial. *McElhaney, supra* at 283. The prosecutor's statement merely asked the jury to focus on the evidence, and the evidence against defendant was compelling. *People v Crawford,* 187 Mich App 344, 354-355; 467 NW2d 818 (1991). Complainant told her sister and her nephew on the night of the attack that defendant had raped her. She identified defendant at a pretrial lineup as the man who broke into her home and beat, raped and robbed her, and she identified him again at trial. Defendant was seen carrying a load of electronic

equipment away from complainant's house shortly after the attack, and complainant's neighbor testified that defendant brought the electronic equipment to her house. Defendant's grandmother testified that on the day complainant was attacked, defendant had threatened to "whoop" complainant's nephew with a baseball bat if the nephew did not pay defendant forty dollars that the nephew owed defendant. A baseball bat disappeared from the grandmother's home that day, and a bat was later found in complainant's home. Complainant testified that defendant hit her during the attack with "a wood something." We conclude that because the prosecutor's remarks were supported by the evidence adduced at trial, not the prosecutor's secret knowledge or opinions, they did not deprive defendant of a fair and impartial trial.

III

Third, defendant argues that his thirty to sixty-year prison sentences for his two first-degree criminal sexual conduct convictions and his armed robbery conviction are disproportionate. We disagree. Defendant's minimum sentences are within the recommended minimum range calculated for defendant's first-degree criminal sexual conduct convictions under the Michigan Sentencing Guidelines and are therefore presumptively proportionate. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995). Defendant presented no unusual circumstances about himself or his crimes to overcome this presumption. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995).

Further, defendant's sentences are well supported by the facts of his case and his personal circumstances. Defendant broke into the home of a sixty-eight-year old woman, nearly blind from diabetes, and beat, raped and robbed her. Complainant told the trial court that she was so traumatized by defendant's attack that she broke down emotionally every time she thought of it and could not stand to be left alone in her home. Defendant was seen taking a load of electronic equipment up complainant's street and into a neighbor's home on the day of complainant's attack. Defendant's psychiatric evaluation revealed that defendant had a history of anti-social conduct and sadistic sexuality. Defendant had two prior convictions, one for unarmed robbery and one for felonious assault. One of defendant's family members told the presentence investigator that defendant had become so uncontrollably angry on occasion that police officers had to be called to subdue him. Based on all of the above, we conclude that the trial court did not abuse its discretion in sentencing defendant to thirty to sixty years in prison for his first-degree criminal sexual conduct and armed robbery convictions because the sentences were proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); see also *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995).

IV

Finally, defendant argues that the trial court violated Michigan's indeterminate sentencing act, MCL 769.8; MSA 28.1080, by imposing a minimum sentence for his first-degree home invasion conviction which was in excess of two-thirds of the maximum sentence allowed. We agree. The trial court imposed a fifteen-year minimum and a twenty-year maximum sentence, the highest allowed by the home invasion statute, MCL 750.110a(4); MSA 28.305(a)(4), for defendant's conviction.

Defendant's minimum sentence violates the rule established by the Michigan Supreme Court in *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), in which the Supreme Court held that a defendant's minimum sentence could not exceed two-thirds the length of the maximum sentence allowed by the controlling statute in order to be valid under the indeterminate sentencing act, MCL 769.8; MSA 28.1080. Consequently, we must vacate defendant's first-degree home invasion sentence and remand defendant's case to the trial court so that the trial court can reduce defendant's minimum sentence to two-thirds of the maximum sentence allowable. *People v Thomas*, 447 Mich 390, 392-394; 523 NW2d 215 (1994).

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff
/s/ Jane E. Markey